United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

NO. 74-2176

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL UNION No. 305, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENT

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I. STATEMENT OF ISSUES

1. Is it a violation of Section 8(b)(1) of the Act for a local union operating a referral system for qualified journey-

men, as defined in a collective bargaining agreement, to fail to refer unqualified persons for work within their limited competency during a period of low employment demand.

2. Is there substantial evidence on the record as a whole to support the Board's finding that the Union violated Section 8(b)(1)(A) of the National Labor Relations Act by failing to refer Anthony DiMella and Victor Bartolucci to employment through its exclusive hiring hall because of their lack of membership in the Union.

3. Is the Board's order a proper one.

II. STATEMENT OF THE CASE

This case is before the Court on application of the Petitioner, National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et. seq.), hereinafter "the Act," for the enforcement of its order issued June 21, 1974 against the Respondent, Local Union No. 0305, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, hereinafter "the Respondent" or "the Union."

The Board's Decision and Order (D&O 1-3)[1/] is reported at

1/ "D&O references are to the Board's decision and order; "ALJD" references are to the decision of the Administrative Law Judge; "Tr." references are to the transcript of testimony before the Administrative Law Judge; "G.C.Ex." and "R.Ex." refer to the exhibits of the General Counsel and the Respondent-Union, respectively, introduced at the hearing.

211 NLRB No. 124.

The Court has jurisdiction under Section 10(e) of the Act.

A. STATEMENT OF THE FACTS

The Respondent-Union represents plumbers, steamfitters, and welders in the New London, Connecticut area (ALJD 2; Tr. 17, 18-19). The Respondent is a party to a collective bargaining agreement (G. C. Ex. 3) with the Mechanical Contractors Association of Connecticut, Inc., acting through its agent, the Eastern Connecticut Mechanical Contractors Association.

1. OPERATION OF HIRING HALL BY RESPONDENT

Under the terms of the collective bargaining agreement, the employers comprising the Mechanical Contractors Association and the Respondent-Union established an exclusive hiring hall arrangement for the referral of qualified journeymen. (G.C.Ex.s 3 and 3(a)). A qualified journeyman is defined in the agreement as one who has had at least five years of actual practical experience in the trade and has either (1) successfully completed an approved apprenticeship program; (2) has previously worked as a journeyman for a signatory contractor, and whose services have proved satisfactory; or (3) has successfully passed a competency test. (G.C. Ex.3) The apprenticeship program involves 10,000 hours of on-the-job training and is the equivalent of five years of practical experience.

(R. Ex. 3, Tr. 319-25 to 319-27)

The agreement further provides that if there is any dispute as to whether an applicant for referral is "qualified," the aggrieved applicant or contractor has the right to submit the dispute to a Joint Hiring Committee for determination. (G. C. Ex. 3) This Committee is composed of an equal number of employer and union representatives. A copy of the hiring hall rules was posted at all times relevant at the union office.

The testimony of the two union business agents concerning the manner in which the referral system was operated, which was uncontradicted, may be summarized as follows. An applicant for referral who was "qualified" would be permitted to register for work if he desired. If the applicant was known by either of the business agents because of his membership in the union, such referral was automatic and could be done by the applicant appearing at the hiring hall or by his calling into the hiring hall office to announce his availability. If the applicant was not known by either of the business agents, they would seek to establish his qualifications by questioning the individual about his prior experience. (Tr. 77-79, 319-50, 383-84)

A member of a sister local was assumed to have completed the required apprenticeship or to have the five years of practical experience. His initiation date would show experience in the trade. A non-member was asked the name of employers

with which he had employment in the craft, the duration of his employment, and the nature of his work within the building construction industry. If there was any doubt as to whether an applicant had met the qualifications with respect to the five-year requirement, the business agents would not make a judgment, but would register and refer the applicant as work became available. (Tr. 77-79)

The record shows that the Respondent has "registered" non-union applicants who met the qualifications and has referred such men to work. (Tr. 57)

The records of the Respondent with respect to the referral system operation introduced at the hearing were not lengthy, and consisted of several sheets on which the names of the applicant, the skill or craft involved, and the date of registration were inscribed. (G.C.Ex. 4) Names were added to the list as requested. Before any name was added, the individual's qualifications were checked. Men were referred from the list and when a man went to work, either a line was drawn through his name or a check mark was entered next to his name. (Tr. 41-43)

The union did not maintain a referral list for individuals who were not qualified. (Tr. 53)

2. EMPLOYMENT HISTORY OF THE CHARGING PARTIES

The charging parties were able to obtain their first referral to work from the Respondent due to the employment

situation prevailing in the New London, Connecticut area in 1969 with respect to the Respondent-Local Union.

The Respondent is a "mixed local," that is, one composed of both plumbers and steamfitters. It is unique in the New England area in that it is the only local which has two atomic power plants located in its jurisdiction. (Tr. 365) Often, a large force of plumbers and steamfitters are required by these plants upon short notice, in addition to welders with a high degree of welding skill. (Tr. 68, 365)

There is a substantial amount of "bull work" involved in such jobs. (Tr. 52-54) "Bull work" entails loading and unloading trucks as well as moving, hoisting, and rigging pipes, valves, and other materials. (Tr. 52-54) None of the "bull work" requires a high degree of skill. (Tr. 52-54) It merely requires "a strong back." (Tr. 170)

In 1969, both of the aforementioned atomic power plants were under construction. (Tr. 319-33) The Respondent was required to meet the tremendous demand for labor called for by the power plant work. (Tr. 52-54, 68, 319-33,34) It was unable to meet these demands from within its own membership. As a result, the Respondent sought and secured qualified journeymen from sources outside the membership of the local union. The Respondent sought assistance from other areas, particularly for skilled welders.

Starting in 1968, the Respondent for the first time began

to issue "permits" to qualified journeymen, even though they were not members of the local union or the United Association. (Tr. 319-34) This action, however, was still insufficient to meet the demand for workers. As a result, the Respondent's business agent informed contractors in the area that the only workers he might subsequently refer were those who were not qualified to work in the trade. (Tr. 68, 319-34) Such men could perform the unskilled portions of the work entailed in the crafts of plumbing, steamfitting, and pipefitting. (Tr. 319-34) These men were treated for payroll purposes and for the purposes of the collective bargaining agreement as journeymen, rather than as apprentices, regardless of their lack of prior experience and training. When a layoff occurred the decision rested with the employer, and usually the unqualified workers were laid off first.

It was in these circumstances that the charging parties were first able to secure employment in August and September of 1969. (Tr. 68) Neither of the charging parties had any experience in plumbing work or in construction work in any capacity. (Tr. 263, 308-309)

Although neither of the charging parties was a qualified journeyman, they were initially referred to work by the Respondent's business agent as a result of his attempt to fulfill the demand for labor at the two atomic power plants then under construction. (Tr. 52-54, 68, 319-33,34) For approxi-

mately half of the period from August 1969 to January 5, 1973, each of the charging parties was able to secure work through referral by the Respondent's business agent, despite their lack of qualifications, because the high demand for labor at the power plants and at other job sites in the greater New London area had exhausted the available supply of qualified journeymen. (Tr. 52-54)

III. ARGUMENT

A. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE DOES NOT SUPPORT THE BOARD'S FINDING THAT THE RESPONDENT VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY FAILING TO REFER THE CHARGING PARTIES TO EMPLOYMENT

1. The provision in the collective bargaining agreement requiring an applicant to have five years of experience in the trade in order to be qualified for referral to employment by the Respondent is not violative of the Act.

At the outset, it must be noted that a hiring hall contract, under which an employer agrees to hire new employees through the union, is not unlawful if the agreement provides for referral of job applicants without regard to union membership or nonmembership. Local 357, Teamsters v. NLRB, 365 U.S. 667, 47 LRRM 2906 (1961).

The gist of the Respondent's argument in this case is that the charging parties were not referred to employment by the Respondent because they lacked the qualification of five years

of actual experience in the trade required for referral under the collective bargaining agreement. (G.C. Ex. 3)

The requirement of five years of experience is not violative of the Act, since the Supreme Court of the United States has held that a contract clause making competency or experience a basis for hiring is not unlawful. NLRB v. News Syndicate Co. 365 U.S. 695, 47 LRRM 2916 (1961).

Under Section 8(f) of the Act, employers who are engaged primarily in the building and construction industry and labor organizations of which building and construction employees are members, are permitted to make agreements specifying the minimum training or experience qualifications for employment.

Furthermore, the Board has held that a Union's refusal to refer non-union employees because of lack of work experience with signatory contractors is not violative of the Act. J-M Company, Inc. (IOUE, Local 965), 173 NLRB No. 227, 70 LRRM 1087 (1969).

2. The charging parties were not qualified journeymen and thus were not entitled to referral to employment by the Respondent.

Since the experience requirement is lawful, it follows that the Respondent did not violate the Act if the basis of its failure to refer the charging parties was their lack of experience. The crucial issue is whether the charging parties were qualified journeymen, since the answer to this issue determines whether the Respondent had any obligation to the

charging parties. Specifically, if the charging parties were qualified journeymen, the Respondent had a duty, under the terms of the collective bargaining agreement, to register and refer them to employment; if they were not qualified journeymen, Respondent had no such duty.

The Administrative Law Judge erroneously concluded that it was unnecessary to make any findings on this issue, in spite of the introduction of "considerable evidence" by the General Counsel to establish the qualifications of the charging parties and by the Respondent to establish that they lacked the necessary qualifications. (ALJD p. 9, fn. 15) Instead, the ALJ concluded that it was sufficient to find merely that both of the charging parties had been referred to a number of jobs during the time they had worked, that they had apparently discharged their duties to the satisfaction of the several employers involved, and that the Respondent's business agent had admitted that both were reliable workmen. (ALJD p. 9, fn. 15) None of these observations, however, establishes that the charging parties were, in fact, qualified journeymen as defined by the collective bargaining agreement, and thus entitled to registration and referral.

The experience acquired by the charging parties in the course of their intermittent employment in the trade from August, 1969 to January, 1973 was set forth in great detail by the Administrative Law Judge. (ALJD, pp. 3-7) His find-

ings of fact show conclusively that neither of the charging parties met the basic qualification for referral set forth in the hiring provisions of the collective bargaining agreement. (G.C.Ex. 3), that is, five years of practical experience in the trade. He failed to find at any point that they did meet the bona fide qualifications established and applied uniformly to all persons.

Thus, (1) neither of the charging parties has five years of practical experience in the trade. DiMella has worked for approximately two and one-half years in the trade. (Tr. 44, 52); Bartolucci has worked about two years and nine months. (Tr. 44, 45,52) (2) Neither have Connecticut State licenses as either plumbers, steamfitters, or welders, nor did either of them meet the qualifications for such licensing. (3) Neither had worked in the building trades industry prior to their referral to employment by the Respondent in 1969. (Tr. 263, 308-309) (4) Neither had ever claimed they were qualified journeymen to the Joint Hiring Committee or appealed to it for a review of their status.

Prior to 1969, DiMella had worked as a "rigger" in the boilermaking trade at an industrial plant, the Groton Shipyard, building submarines. (Tr. 262)

DiMella admitted that he could not do any welding, the most essential skill of the journeyman's trade. (Tr. 257, 325) He has never completed an apprenticeship program of any kind in any trade. (Tr. 270, 323) He has never taken an examina-

tion to test his alleged skills as a journeyman in the trade. (Tr. 272) He has never taken any courses in any of the areas required for the trade, including hydraulics, general mechanics, physics, blueprint reading, and shop mathematics. (Tr. 323-324) He has never engaged in any braising work, water pipe work, including the laying out of a domestic hot water system, and has never installed any sinks, wash trays, water heaters, or similar types of equipment. (Tr. 327)

When questioned with regard to one job on which he had worked for over a year, DiMella was unable to identify the material composition of the pipe with which he had worked. (Tr. 249-50) He also testified that the welder whom he had helped on the job had welded cast iron pipe, (Tr. 249-250), which is a physical impossibility. (Tr. 319-24) Such a statement, in the words of the Respondent's business agent, Impelliteri, shows that one "does not know the first thing about the business" of plumbing and steamfitting. (Tr. 319-24)

Prior to 1969, Bartolucci had worked as a bar and restaurant operator and as a gas company meter reader. (Tr. 309) He has not acquired the most essential skill of the journeyman's trade: welding. (Tr. 315) He has never completed an apprenticeship training course in any trade. (Tr. 314) He has never taken any courses in any of the areas required by the trade, including blueprint reading, hydraulics, pneumatics, general mechanics, and physics. (Tr. 314-315) He has never

installed any heating equipment in industry or homes, has never laid out or installed a domestic hot water system, has never installed and tested pressure or release valves, and has never threaded pipe. (Tr. 315-316) Bartolucci has never applied to take an examination to test his alleged skills in the plumbing and steamfitting trade. (Tr. 319-11)

In summary, substantial evidence on the record as a whole shows that the charging parties were not qualified journeymen. For this reason, the Respondent had no duty to refer the charging parties to employment. The conclusion of the Board that the Respondent violated the Act- by failing to refer the charging parties to employment is not supported by substantial evidence. Its application for enforcement must, therefore, be denied. Universal Camera Corp. v. NLRB, 340 US 474, 488-490, 27 LRRM 2373 (1951).

2. The conclusions of fact made by the ALJ and accepted by the Board as its own are not supported by substantial evidence on the record as a whole.

As has been established above, the Administrative Law Judge failed to make any findings as to the key issue of this matter, that is, whether the charging parties were qualified journeymen so as to be entitled to be registered or be referred to work by the Respondent-Local Union. Ignoring this preliminary issue, the Administrative Law Judge proceeded in his decision to find that "the true purpose for refusing to refer the two men to jobs was their lack of membership in the Union. " (ALJD, p. 9)

This conclusion was based upon three "considerations" taken into account by the Administrative Law Judge. (ALJD, p.9). These three "considerations" do not, however, establish that the Respondent denied the charging parties referral because they lacked union membership. As a result, the conclusion of the Administrative Law Judge as to the Respondent's motive in denying the charging parties referral is erroneous.

The first "consideration" which the Administrative Law Judge took into account was that "Over an approximately four year period Impelliteri (the Respondent's business agent) referred Bartolucci and DiMella to jobs notwithstanding his knowledge of their alleged lack of qualification."

This "consideration" is clearly irrelevant. It is uncontested that the charging parties were referred to work at all times because the Respondent's business agent had exhausted his supply of available qualified journeymen and unqualified persons would be accepted by the Employers in order to meet the inordinately great demand for workers; the Respondent had no choice but to refer unqualified men. (See pp. 5-8 above). Once the demand for workers had decreased to the point where the supply of qualified journeymen was adequate to meet such demand, it was no longer necessary to resort to the use of unqualified workers.

The second "consideration" taken into account by the ALJ is that "(i)n the numerous conversations Impelliteri (the Union's business agent) had with Bartolucci and DiMella he never once made reference to their alleged lack of qualifications."

This "consideration" is (1) irrelevant and (2) contradicted by the ALJ's third "consideration."

It is irrelevant because Impelliteri had told the charging parties that the reason that they were not referred was that there were qualified people whom he had to put to work first. (Tr. 73) Of necessity, this implies that the charging parties were not qualified. As far as Impelliteri was concerned the charging parties knew they were not qualified and thus there was no reason to discuss with them their lack of qualifications. (Tr. 73)

Further, the Administrative Law Judge's second "consideration" is contradictory to his third. In his third "consideration," the Administrative Law Judge points out that the Respondent's business agent made statements to the charging parties that he had "book men" out of work who came first. (ALJD, p. 9) The Administrative Law Judge uses this fact to conclude that Union membership was a condition precedent to referral through the Respondent's hiring hall, and thus that the charging parties were discriminated against because of their lack of union membership. Yet the ALJ had himself cleared the record to show that the term "book men" as used by the Respondent's business agent was synonomous with the term "qualified men," and that the business agent included within the term "bookmen" all persons who had five years of experience within the trade. (Tr. 316-19):

> Judge Nachman: In the jargon of the union, so to speak, qualified men, bookmen, means the same thing.
>
> The Witness : Yes, sir.
>
> (Tr. 319-16)

It is obvious that the ALJ's third "consideration" is contradictory to his second one. On one hand, the Administrative Law Judge found, in effect, that the Respondent's business agent had

told the charging parties that there were qualified men out of work who would be referred to work before the charging parties. The only logical way in which this statement can be interpreted is that the business agent was telling the charging parties that they did not have the right to referral because they were not qualified.

On the other hand, in his second "consideration," the ALJ found that the Respondent's business agent had not communicated to the charging parties the fact that they were not qualified. It is clear from the third "consideration" that he had so communicated Thus, the ALJ's own findings are contradictory to one another.

Further, with regard to the third "consideration," it is clear that if the term "book men" is synonomous with the term "qualified men," then there is no basis for the ALJ's conclusion that union membership was made a condition precedent to referral to a job through the Respondent-Union's hiring hall.

Even if it is assumed, for the purposes of argument, that the term "book men" was used by the Respondent's business agent to mean "union men," there is still no basis for the ALJ's conclusion that the use of such words can be construed as evidence of an attempt to discriminate against non-union members who are unqualified. Thus, in Amalgamated Meat Cutters, Local 576, 201 NLRB No. 132, 82 LRRM 1408, 1409, cited by the ALJ, the Board stated:

> In the present case, the union's officials frequently used the words "union members" to describe the individuals using the hiring hall. However, it is noted that these words were used in the context of am open hiring hall operated by individuals whose primary and day-to-day associations are with their own members;

> in such a context, it would seem highly probable that the officials would confuse "members" with "persons" in routine conversations and explanations. Accordingly, this confusion of terminology is not deemed evidence of an attempt to discriminate or to prefer one class of job applicant over another.

Once proper weight is given to the term "book men," there is absolutely no basis for the conclusion that the charging parties were not referred to work because of their lack of union membership.

Furthermore, the ALJ's conclusion discounts completely the past relationship of the parties, which showed that there was no animosity between the parties and that the Respondent's business agent was able to place the charging parties on jobs for over half of the four-year period, despite their lack of experience and non-membership status.

For the aforementioned reasons, the ALJ's third "consideration" is erroneous insofar as the ALJ concluded that by informing the charging parties that there were qualified men out of work who took priority over them, the Respondent was making Union membership a condition precedent to referral.

> 3. Substantial evidence on the record as a whole shows that the Respondent's requirement that a journeyman have five years of experience in the trade in order to be referred to employment was not for the purpose of excluding non-Union workers from referral.

It is concluded from the discussion above that the sole reason for which the charging parties were not referred to employment by the Respondent was because they lacked the necessary qualifications for referral. It follows that the Respondent's acts are not in violation of the National Labor Relations Act, unless there

is proof that the requirement is for the purpose of excluding non-union workers from referral by the hiring hall. Local 357, Teamsters v. NLRB, supra.

The Administrative Law Judge failed to make any finding on this issue. The Respondent submits that substantial evidence on the record as a whole shows that the five-year requirement was not directed at excluding non-members of the Union from referral, either in practice or in theory.

The testimony established that, in theory, the five-year requirement is intended to be the equivalent of the Respondent's 10,000-hour apprenticeship program. (Tr. 319-25) One year of actual experience on the job represents approximately 2,000 hours of apprenticeship training. (Tr. 319-25) Assuming that one works forty hours per week, fifty weeks of the year, the 2,000 hour figure is fairly accurate. Thus, the theory behind the five-year requirement is based in logic and is not discriminatory per se against non-members of the Union.

In actual practice, the five-year requirement does not operate to exclude non-union workers from referral by the Respondent. The referral list kept by the Respondent had both union and non-union workers on it. (Tr. 57)

There was no evidence submitted that the Respondent had ever refused to refer qualified non-union workers to employment or that the Respondent favored union members over non-members in operating the hiring hall.

4. Even assuming, arguendo, that the charging parties were qualified journeymen, substantial evidence on the record as a whole does not show that the charging parties were excluded from referral because of their non-membership in the union.

Even if it is assumed, for the purposes of argument alone, that the charging parties were partially qualified and thus entitled to be referred to those jobs for which they were so qualified, the evidence still does not show that the reason the charging parties were not referred to work was because of their lack of membership in the Union.

The record shows that the charging parties first obtained work as a result of referral by the Respondent in August and September of 1969. (Tr. 192, 277-278) They were laid off from the last power plant job on January 5, 1973. (Tr. 211, 298) In this period of approximately three and one-half years, the charging parties were referred to employment two and one half years, in DiMella's case, (Tr. 44), and two years, nine months, in Bartolucci's case. (Tr. 45)

The record further shows that between January 5, 1973 and April and May, 1973, when the charging parties were referred to work by the Respondent as gas distribution helpers, the reason

they were not referred to work was because (1) there were an abundance of fully qualified journeymen out of work (Tr. 72, 319-37, 38) and (2) there were no jobs available for which the charging parties were qualified. (Tr. 319-23, 362)

During the period following January 5, 1973, the charging parties were told by the Respondent's business agent, Impelliteri, that there was no work for them. (Tr. 71) The Respondent's other business agent, Quinn, testified that after January 5, 1973, no one with less than five years of actual experience was referred to work. (Tr. 337-8) There is no evidence that there were any jobs available during this period for which the charging parties were qualified. As such, the Petitioner's conclusion that the Respondent's failure to refer the charging parties was based upon their lack of Union membership is clearly erroneous: one cannot be referred to a job which does not exist.

Moreover, there is no evidence of any hostility toward the charging parties on the part of the Respondent because of their lack of union membership. Both the charging parties and the Respondent's business agents testified that there was no personal animosity between them. (319-1, 319-24) This is supported by the facts that the Respondent's business agent, Impelliteri, gave the charging parties applications for membership to the Union upon request, (Tr. 48, 96, 232), and submitted their applications to the Union membership for approval, even though the charging parties did not have the requisite five years of actual experience as journeymen. (Tr. 104-5) The applications were tabled by the Union membership. (Tr. 352-3)

In sum, substantial evidence on the record as a whole does not show that the basis of the Respondent's failure to refer the charging parties to work was their lack of membership in the Union. There is absolutely no evidence in the record that there were any jobs available for which the charging parties were qualified and to which the Respondent might have referred them. The Petitioner's conclusion that the Respondent failed to refer the charging parties because they lacked membership in the Union contains an unwarranted assumption that there were jobs available for them. This assumption is simply not supported by the evidence.

B. THE BOARD'S ORDER IS NOT PROPER

In the event that the Court finds that substantial evidence on the record as a whole supports the Board's finding that the Respondent violated Section 8(b)(1)(A), the Respondent contends that the proposed order of the Board is improper.

1. The complaint alleged two violations of the Act. (G.C. Ex.s 1(a), 1(c)) The General Counsel sought by way of remedy only back pay and the cessation of illegal discrimination against the parties. In spite of this, the Board held that the Respondent's violations require a blanket order.

There is nothing in the record which shows that there was large-scale discrimination in the past or that there will be in the future so as to warrant a cease and desist order. In support of his recommendation for such an order, the ALJ relied on two cases, (ALJD, p. 9), neither of which is applicable. In NLRB v. Entwhistle Manufacturing Co., 120 F. 2d 352, 8 LRRM 645, (CA 4,

1941), the Board found that the discharge of an employee based upon his union activity "goes to the very heart of the Act." Here, there is no discharge and the charging parties were, in fact, referred to employment by the Respondent even after they had filed their complaints against the Respondent.

Furthermore, in both Entwhistle and California Lingerie, Inc., 129 NLRB No. 108, 47 LRRM 1091 (1960), on which the ALJ additionally relied in fashioning his remedy, there was evidence of "more than an isolated violation of the right to self-organization." Here, even if it is assumed that the Respondent discriminated against the charging parties, the evidence does not show that the discrimination was anything more than an isolated incident. For these reasons, the issuance of a cease and desist order by the Petitioner was improper. Paragraph 1(b) of the order should be deleted.

2. The Board's order provides that the charging parties be made whole in the manner set forth in the "Remedy." (ALJD p. 11) The Respondent submits that such "Remedy" is improper.

The charging parties are not entitled to any back pay because there is no evidence in the record that work was available from February, 1973 to date for which the charging parties were qualified. On the contrary, the Respondent's business agent stated without contradiction that no one with less than five years of experience in the trade has been referred to employment since February of 1973. (Tr. 337-338) In the absence of any evidence that there was work available for which the charging

parties were qualified, they are not entitled to back pay awards. Furthermore, even if it is assumed that there were jobs to which the charging parties could have been referred, it is mere speculation as to whether employers would have accepted them. At best, the charging parties are entitled to be referred to work which they are able to perform. The order should therefore be modified by deleting therefrom Paragraphs 1(a), 2(d), and 2(e). Amalgamated Meat Cutters, Local 576, 201 NLRB No. 132, 82 LRRM 1008 (1973).

3. The Board's order at Paragraph 2(c) requires the Respondent to maintain permanent written records of its hiring and referral operations and to make available for inspection upon request of the Board, all records in anyway relating to the hiring and referral system. This order is contradictory to the ALJ's dismisal of the complaint insofar as it alleged 8(b)(1)(a) violations for failure to keep records with regard to the hiring procedure. (ALJD, p. 9, fn.16) The proposed order, in effect, sustains this part of the complaint by directing a remedy for such violation.

Furthermore, the evidence shows that records are kept to implement the hiring and referral processes. (G.C. Ex. 41) Even though the Petitioner may contend that such records are not complete, there is no evidence to support such a contention. The hiring hall is established to serve "qualified" persons alone. The Respondent's records fairly and completely reflect the unemployment and availability of such persons. The collective bar-

gaining contract does not require record-keeping with regard to those who are not qualified to register for referral, or keeping a list of those who are partially qualified and desirous of securing work of any nature in the trade. To require the Respondent to do so would permit the Petitioner to rewrite the contract.

Nor has the Petitioner found any support for the contention that a record-keeping system is required per se with respect to the registration and dispatching of applicants for referral to employment. The ALJ himself noted that there can be situations in which an entire hiring hall can operate without maintaining a single record. While it might be ideally desirable to do so, unless it can be shown by substantial evidence that the failure to keep more complete records than those kept here by the Respondent was due to a desire to frustrate the collective bargaining agreement and the rights of potential employees, there is no basis for the claimed violation. If there is a breach of contract, the remedy lies with action by an aggrieved employee who has been denied employment or an aggrieved employer who has been unable to secure adequate personnel. Neither situation is shown here.

For the reasons discussed above, Paragraph 2(c) of the Petitioner's order should be deleted.

IV. CONCLUSION

Substantial evidence on the record as a whole does not support the Board's finding that the Union violated Section 8(b)(1)(A) of the Act by failing to refer the charging parties to work through its exclusive hiring hall because of their lack of membership in the Union. The Board's order is therefore improper.

Accordingly, the Court should deny enforcement of the order of the Petitioner, National Labor Relations Board, against the Respondent.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	:	
Petitioner,	:	
v.	:	
LOCAL UNION No. 305, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,	:	No. 74-2176
Respondent.	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Respondent's brief in the above captioned case, has this day been served upon the following counsel at the address listed below:

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LOCAL UNION NO. 305, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

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Dated at Hamden, Conn.

this 27th day of March, 1975.